IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6122 of 1987
And
SPECIAL CIVIL APPLICATION No. 1638 of 1990

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRAVINCHANDRA VRAJLAL PANDYA & ANR.
Versus
BHAVNAGAR MUNICIPAL CORPORATION

Appearance:
1. Special Civil Application No. 6122 of 1987
MR YV SHAH for Petitioner
MR JR NANAVATI with AR THACKER for Respondent No.1
MR JD AJMERA for Respondents No. 2-5,7-8
RULE SERVED for Respondent No. 6

2. Special Civil Application No. 1638 of 1990
MR YV SHAH for Petitioner
MR JR NANAVATI with AR THACKER for Respondent no.1
RULE SERVED for Respondents No. 2-18

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
Date of decision: 14/09/2004

ORAL JUDGEMENT

Heard the learned advocates. The petitioners in both these petitions claim identical relief. The petitions are, therefore, with the consent of the learned advocates, disposed of by this common judgment.

The petitioners are the employees of the Bhavnagar Municipal Corporation [hereinafter referred to as "the Corporation"], the respondent no.1 herein. The petitioners challenge promotion of the respondents nos. 2 to 8 to various posts under the Chief Auditor made on 10th November, 1987. The petitioners also claim that they are entitled to promotion as Deputy Chief Auditor.

The petitioner in Special Civil Application No. 6122 of 1987 was, at the relevant time, serving as Junior Clerk and was holding charge of the post of Octroi Sub-Inspector. It is the claim of the petitioner that in the cadre of Junior Clerk, the petitioner was senior to the respondents no. 2 to 8. The petitioner, therefore, had a prior claim for promotion to the post of Deputy Chief Auditor, Senior Auditor, or atleast as Inspector. Pending this petition, the petitioner was promoted to higher posts of Sub-Inspector, Inspector and Assistant Octroi Superintendent. I am informed that the said petitioner shall, on reaching the age of superannuation, retire from service on 30th November, 2004.

The petitioner in Special Civil Application No. 1638 of 1990 was also, at the relevant time, serving in the Corporation as a Junior Clerk. He has challenged promotion of respondents nos. 4 to 18 to the cadre of Senior Auditor, Sub-Auditor, Assistant Auditor, Senior Clerk, etc. under the Chief Auditor. It is the claim of the said petitioner that the said petitioner was eligible for such promotion and was senior to the said respondents nos. 4 to 8. He has, therefore, claimed promotion to higher posts under the Chief Auditor of the Corporation.

The claim for promotion made by both the petitioners has been contested by the Corporation. Learned advocate Mr. J.R Nanavati has submitted that by Resolution dated 24th December, 1985, the General Body of the Corporation, keeping in view the provisions contained in Secs. 47, 51,56 & 57 of the Bombay Provincial Municipal Corporations Act, 1949 [hereinafter referred to as, "the Act"], decided to divide the establishment of the Corporation in three different services; one under the Commissioner, second under the Secretary and the

third under the Chief Auditor. Pursuant to the said decision, all the employees of the Corporation were called upon to submit their option to continue in the service of the Corporation in one of the said Divisions. The petitioners did not give any specific option. The petitioners, therefore, were continued in their existing post under the Commissioner. Since the division of services, the seniority, promotion, etc. of the employees of the Corporation is confined within the Division. In that view of the matter, the petitioners' claim for promotion to the cadres in the Audit division is not tenable. The petitioner were posted in the division under the Commissioner. They had no right to promotion in the Division under the Chief Auditor. They were, therefore, not considered for promotion in the Audit division under the Chief Auditor of the Corporation.

In answer to the above contention, learned advocate Mr. Shah has submitted that neither of the petitioners was ever informed about the aforesaid resolution or the division in the services of the Corporation. Upon verification, it was found that the petitioners were not given option as recorded in the Order dated 11th February, 1988 :: Coram : Hon'ble Mr. Justice A.M Ahmadi, as he then was & Mr. Justice P.M Chauhan. Mr. Shah has, therefore, submitted that the petitioners should now be permitted to opt for absorption under the Chief Auditor with retrospective effect and be given promotion under the Chief Auditor from the dates the aforesaid respondents were so promoted.

Mr. Shah has relied upon the settlement dated 4th May, 1951 arrived at between then the Bhavnagar Municipality and its employees. He has submitted that the said settlement is still in operation. According to the said settlement, the Municipal employees are entitled to promotion from the lower cadre to the higher cadre after considering their seniority and merit. He has submitted that the aforesaid settlement is not implemented by the Corporation. He has also relied upon the advertisement dated 24th May, 1986 published by the Corporation. He has submitted that by the said advertisement, the Corporation had invited applications for appointment to various cadres under the Chief Auditor of the Corporation. The said advertisement also referred to the qualification required for each cadre. He has submitted that in utter violation of the said requirements, the concerned respondents have been promoted to the various cadres under the Chief Auditor, though they do not possess the qualification as

prescribed in the aforesaid advertisement. In the submission of Mr. Shah, the promotion of the respondents is contrary to the aforesaid settlement, advertisement and the provisions contained in Section 51 (4) and Section 53 of the Act.

Learned advocate Mr. Nanavati has submitted that the aforesaid advertisement was published with a view to making selection for appointment to the cadres under the Chief Auditor of the Corporation. However, the said action of the Corporation in filling the posts by selection and direct recruitment was challenged by the union of employees of the Corporation in Special Civil Application No. 3192 of 1986. Reliance was also placed on the aforesaid settlement dated 4th May, 1951. This Court [Coram : M.S Shah, J.] by its judgment and order dated 29th November, 2001 directed that, "..the respondent-Corporation shall fill-in the posts under the Bhavnagar Municipal Corporation in the ratio of 70% by promotion [provided suitable departmental candidates are available] and 30% by direct recruitment with effect from 19th February, 1998." Mr. Nanavati has submitted that pending the said petition, in view of the interim stay ordered by the Court, no selection or recruitment was made pursuant to the said advertisement dated 24th May, 1986. The posts under the Chief Auditor, therefore, were filled-in by promotion of the employees serving under the Chief Auditor. Mr. Nanavati has submitted that pending these petitions, the petitioners have earned as many as three promotions within their Division. The question of their opting for absorption in the Audit Division or their promotion in the Audit Division shall not arise.

The factum of the Resolution dated 24th December, 1985 and the division of services in the Municipal Corporation in three divisions viz., Commissionerate, Secretariat and Audit is not in dispute. It is also not in dispute that ever since the said divisions, the seniority and promotions of the employees of the Corporation is maintained within the division. Admittedly, the petitioners were Jr. Clerks in the Division under the Commissioner. They have been promoted within their division. The petitioners have accepted such promotions granted to them from time to time. The petitioners, therefore, cannot now be permitted to give option to be absorbed in the Audit Division and claim promotion within the Audit Division. It should be noted that the petitioners were aware of the said three divisions and maintenance of seniority and promotions made in the Corporation within the division. Nevertheless, till the date, the petitioners have not

asked for giving them option. It is for the first time when these petitions are heard, the petitioners have claimed that they be deemed to have given option for Audit Division. Such belated claim cannot be accepted. Admittedly, the petitioners have earned as many as three promotions within their division and the petitioner in Special Civil Application No. 6122 of 1987 is about to retire within couple of months. The petitioners' claim for promotion in the Audit Division is untenable and requires to be rejected. As to the aforesaid settlement, this Court [Coram : M.S Shah, J.] has considered the scope and effect of the said settlement under the above referred judgment dated 29th November, 2001. In my view, in absence of any rules made by the Corporation and approved by the State Government, the implementation of the said settlement and appointment to varius cadres in the Corporation by promotion and direct recruitment shall be governed by the directions issued in the above referred Special Civil Application No. 3192 of 1986.

As to the qualifications for appointment to various cadres under the Chief Auditor, it should be noted that the said qualifications were prescribed for appointment by direct selection. No qualification has been prescribed for appointment to the said posts by promotion. Hence, the question whether the concerned respondents possess the requisite experience as mentioned in the advertisement dated 24th May, 1986 or not is of no consequence. The said respondents cannot be said to be ineligible for appointment by promotion.

In view of the above discussion, the petitioners' claim for promotion to various cadres under the Chief Auditor shall fail. Both these petitions are dismissed with costs. Rule nisi issued in each petition is discharged. Interim relief shall stand vacated. Registry shall maintain copy of this order in each petition.

{Miss R.M Doshit, J.}

Prakash*